UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FOREST PANEL AND LUMBER HOME CENTER, INC., d/b/a FOREST BUILDERS SUPPLY

and **Case No. 29-CA-27079**

LOCAL 522, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Nancy Lipin, Esq., Counsel for the General Counsel
George A. Kirschenbaum, Esq. and Nzinga Parris, Esq., Counsel for the Charging Party
John A. Servider, Esq., Counsel for the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on February 15 and 16, 2006. The charge and amended charge were filed on July 21 and September 26, 2005. The Complaint was issued on November 15, 2005 and alleged:

1. That the Respondent has been a member of the Building Material Suppliers Association and has authorized it to bargain on its behalf with the Union with respect to an appropriate unit of employees.

2. That on or about March 7, 2005, the Association and the Union reached a complete agreement which became effective from February 1, 2005 to January 31, 2010.

3. That on or about April 12, 2005, the Respondent withdrew recognition from the Union.

4. That on April 13, 2005, the Union requested that the Respondent adhere to the contract described above.

5. That since on or about May 1, 2005, the Respondent has refused to adhere to the contract.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

Findings and Conclusions

I. Jurisdiction

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

Forest Builders Supply Company, (herein Forest), has been engaged in the lumber supply business for many years. Its owner is Bendt Messing. During a period from about 2001 to 2003, Forest entered into a business relationship with another company called Miron Lumber which ultimately resulted in Mr. Messing buying the latter company from its aging owners. When Miron was bought out by Messing, it was and remains a much larger company than Forest and employees about 4 or 5 times the number of people.

The evidence shows that for at least 20 years, the Building Material Suppliers Association has been a loose aggregation of competing small lumber yards in New York and New Jersey who had collective bargaining agreements with Local 522, International Brotherhood of Teamsters. This organization essentially does only one thing, which is to gather together every several years, select some employer representatives and negotiate collective bargaining agreements with the Union. Employers in the industry can become members simply by indicating their desire to be members and paying a quarterly fee of $300 to $400 per quarter. There does not appear to be a Constitution and Bylaws, and people don't join by filling out an application or signing some kind of agreement. At times, the Association has retained an attorney to assist in negotiations but in the last sets of negotiations, it acted without legal counsel. For at least the last three set of negotiations, Gary Kaplan, an owner of Bay Ridge Lumber, has acted as the chief spokesperson for the Association.

For many years prior to the acquisition, Miron had maintained a collective bargaining relationship with the Union and was a member of the Association. Forest, however, has operated as a non-union shop. According to Messing, when it became clear that he was going to acquire Miron, he and his employees talked among themselves and decided that it might be worth their while to join Local 522 and for Forest to join the Association. (The apparent benefit being the Union's health plan).

In any event, in or about late 2001, Forest joined the Association during the mid term of the existing contract that ran from February 1, 2002 to January 31, 2005. That contract was executed between the Building Material Suppliers Association and Local 522 and was executed by Gary Kaplan on behalf of the Association. The past practice has been that the individual employer/members of the Association did not execute separate contracts and simply adopted and followed the Association Agreement.

At about the same time, Messing purchased Miron. When taken over, Miron was managed, on a day to day basis by Derek Messing, (Bendt's son) and Peter Reimann who was a long time employee of Miron. At that time, *and continuing to date*, Miron has remained a member of the Association and has adopted the extant Association contract for its employees.

During the same period of time, the Union had some problems of its own and the International placed Local 522 in trusteeship. Its new leadership since 2003 has been Daniel J. Kane, Joseph Byers and Peter Murphy.

The evidence shows that since joining the Association, Forest has paid quarterly dues from the third quarter of 2001 to the first quarter of 2005. It made its last dues payment by check dated February 21, 2005. This covered the first quarter of 2005.

Notwithstanding testimony by Messing and employee Pagan to the effect that Forest's employees began to be disenchanted with the Union in 2004, (due mostly to difficulties with medical reimbursements), the evidence does not show that prior to April 2005, the employees formerly attempted to resign from the Union or that Forest notified the Union of its desire to withdraw from the Association.

Although Messing testified that he had some conversations with Kaplan in late 2004 and early 2005 to the effect that he wanted to withdraw from the Association, this was denied by Kaplan, whose testimony was, in my opinion, candid, unbiased and credible.[1]

On November 3, 2004, the Union, by Joseph Byers, (and in accordance with the notice requirements of Section 8(d) of the Act), sent a letter to 13 employers including Miron and Forest.[2] This stated:

> The Collective Bargaining Agreement by and between Local Union 522 I.B.T. and Forest Builders Supply is due to expire on January 31, 2005. We hereby offer to meet and confer with you for the purposes of the renewal of the Collective Bargaining Agreement.[3]

On January 20, 2005, Byers sent a set of contract proposals to the Association, care of Robert Feldman of S. Feldman Lumber Co., Inc. The forwarding letter also set forth the names of the employees who would make up the Union's negotiating team.

The first bargaining session was held at a hotel in Newark, New Jersey on February 8, 2005. At the meeting, everyone introduced themselves and the testimony of Byers, Murphy, Kaplan and Feldman was that Peter Reimann introduced himself as representing Miron and Forest. The other employers who were present were Dennis and Ed Detillo from Bayway Lumber, Jeff Kelly from Myles. F. Kelly Co. Inc., Bob Feldman from S. Feldman Lumber Company, and Gary Kaplan from Bayridge Lumber Company. The other employers did not attend this meeting, and it is not clear to me that any of the other employers attended the two other negotiation sessions. At this meeting, Kaplan was the lead spokesperson for the Association but as negotiations progressed, Feldman's role became more prominent. Also at

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[1] The Respondent also offered into evidence two letters, one dated December 27, 2004 and the other dated February 1, 2005 purporting to confirm a conversation between Messing and Kaplan wherein Forest expressed its desire to withdraw from the Association. These documents were not signed and were not drawn up by Messing. He testified that he asked his ex-wife and secretary to draft and send these letters. However, Kaplan denied that he received either letter and the Respondent did not offer any convincing evidence that they were sent.

[2] The Union concedes that two employers, Gold Lumber Company and Builders General Supply Co., had notified them in early 2004 that they were withdrawing from the Association. As to those two, the Union negotiated separate contracts with them.

[3] There is nothing in the 2002 to 2005 contract which requires that the employer members of the Association renew or reaffirm their membership in the Association after the contract expires or before any new agreement is reached.

this meeting, Kaplan on behalf of the Association and Byers on behalf of the Union signed a document extending the contract that had expired on January 31, 2005, retroactively from February 1 to April 30, 2005.

A second bargaining session was held on February 16 and the final session was held on March 7. At the last session, the parties reached a deal and executed a memorandum setting forth the agreement. The people signing this document for the Employers included Kaplan, Feldman, and Reimann.

On March 8, 2005, the Union sent a letter to its members regarding a ratification vote to be held on March 21, 2005.

On March 25, 2005, Forest's attorney, John Servider, sent a letter to Gary Kaplan of the Association. This stated in pertinent part;

> As you should know, I represent Forest Builders Supply Company and in our telephone conversation you advised that Forest Builders Supply Company had signed the Agreement to go forward with Local Union 522 and the Building Material Suppliers Association.
>
> As I had informed you, my client advised me that they did not sign any Agreement and that any Agreement that was signed was signed by Miron Lumber.
>
> Furthermore, I explained to you that Forest Builders Supply Company has no intention of going forward with any Agreement with Teamsters Local 522….

On April 6, 2005, Servider sent another substantially similar letter to Kaplan which Kaplan faxed back with the handwritten comment:

> With great respect, Miron is the member and Forest is not, to my knowledge, a confirmed, signed in member and therefore is on their own.[4]

Acknowledging that he made this notation on the letter sent to him on April 6, 2005, Kaplan testified that no one from Forest indicated any intention of resigning or withdrawing from the Association *before* the conclusion of the negotiations that resulted in the agreement on March 7, 2005. And there is nothing in the letter or Kaplan's response that contradicts that assertion.

On April 8, 2005, five employees of Forest signed a petition indicating that they did not want to remain members of Local 522. This was given to Messing but was not sent by them to the Union.

On April 13, 2005, Servider sent a letter to the Union's attorney, George Kirschenbaum, stating that Forest was no longer a part of the Association. He attached the employee petition described above and the handwritten response by Kaplan previously noted. His letter further stated; "Kindly discuss this with your client and advise as to how we can terminate the Union membership of the employees of Forest Builders Supply Company with Local 522."

[4] The last dues payment by Forest to the Association was made on February 21, 2005.

On April 26, 2005 Servider sent another letter to Kirschenbaum stating inter alia that Forest was not a member of the Association, that Forest did not participate in the negotiations and that Forest was, in effect, withdrawing recognition from the Union.

On May 16, 2005, Kirschenbaum responded and stated that in his opinion, Forest was bound by the Association contract because the Employer "cannot withdraw from a multi-employer association without notifying the Union prior to the collective bargaining negotiations."

The evidence shows that at some time after the March 7 memorandum, a new and complete collective bargaining agreement was drawn up which, by its terms is effective from February 1, 2005 to January 31, 2005.

Whereas Miron has abided by and applied the terms and conditions of the new contract to its employees, Forest has not. In that respect, Forest has not implemented the wage increases that were called for in the new agreement and has not made the contractual required payments to the Pension and Welfare Funds.

III. Analysis

Since the Respondent recognized and adopted a collective bargaining agreement with the Union in 2001, it cannot now assert, (almost five years later), that this recognition might have violated Section 8(a)(2) of the Act when it occurred. *Route 22, Auto Sales*, 337 NLRB 84, (2001).

Although multi-employer bargaining units generally take the form of membership associations, this is not a *sine qua non* for such a unit. It is not critical that there be a formal organization to which individual employers belong or pay dues. Whether an employer is or is not a member of an Association is not controlling. What is controlling is whether the individual employers have each manifested unequivocally an intention to be bound by group bargaining rather than by individual action. *Kroger Co*., 148 NLRB 1078 (1974). *Greenhoot Inc*., 205 NLRB 250 (1973); *Rock Springs Retail Merchants Ass'n*, 188 NLRB 261 (1971); *Van Eerden Co.*, 154 NLRB 496 (1965). Cf. *N.Y. Typographical Union No. 6 (Royal Composing Room*), 242 NLRB 378 (1979); *Ruan Transport Corporation* 234 NLRB 241 (1978).

In *Retail Associates Inc.* 120 NLRB 388 (1959), the Board created a set of rules regarding multi-employer bargaining and the circumstances under which an employer can withdraw from group bargaining. The Board stated *inter alia*:

> We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multi-employer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, accept on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.

The rationale of *Retail Clerks* is that of "fostering and maintaining stability in bargaining relationships," by not allowing employers who do not like the way negotiations seem to be going, to opt out of the negotiations and insist on separate negotiations after they have committed themselves to bargaining on a multi-employer basis. This rationale applies equally to a union and should preclude a union from attempting to divide and conquer. That is, a union

which starts bargaining on a multi-employer basis should, absent consent of the Association as a whole, be precluded from dealing directly and separately with the Association's members and attempting to reach separate contracts. Further, the requirement that a withdrawal be accomplished only by a written notice was designed to create certainty and remove subjective criteria which could require the need to make future credibility findings.

In *Charles D. Bonanno Linen Service, Inc. v. NLRB,* 454 U.S. 404, 410-411 (1982), the Supreme Court noted that the *Retail Associates* rules "permit any party to withdraw prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. Once negotiations for a new contract have commenced, however, withdrawal is permitted only if there is 'mutual consent' or 'unusual circumstances.'" The "unusual circumstances" exception has historically been limited to only the most extreme situations, such as where the employer is subject to extreme financial pressures or where the multiemployer unit has dissipated to the point where the unit is no longer a viable bargaining entity. Id. at 410-411.

In *Hi-Way Billboards*, 206 NLRB 22, (1973), enfd. denied 500 F.2d 181 (5th Cir. 1974), the Board held that an employer may withdraw from multi-employer bargaining after negotiations have begun in the following circumstances. For example, the Board has held that an employer may withdraw from group negotiations after they have begun where **(a)** the employer is subject to extreme economic difficulties resulting in an arrangement under the bankruptcy laws. *U.S. Lingerie Corp*., 170 NLRB 750 (1968); **(b)** where the employer is faced with the imminent prospect of closing, *Spun-Jee Corp*., 171 NLRB 557 (1968) and **(c)** where the employer is faced with the prospect of being forced out of business for lack of qualified employees and the union refuses to assist the employer by providing employees. *Atlas Elec. Serv. Co*., 176 NLRB 827 (1969). However, an assertion of dire economic circumstances will not justify withdrawal from the unit after an agreement is reached. *Co.-Ed Garment Co*., 231 NLRB 848, (1977); *Arco Elec Co., v. NLRB* 618 F.2d 698, (10th Cir. 1980).

Unusual circumstances were not found when **(a)** an employer asserted a good-faith doubt of the union's majority status among his own employees, *Sheridan Creations*, 148 NLRB 1503 (1964), enfd., 357 F.2d 245 (2nd Cir. 1966); **(b)** where all the employer's unit employees were discharged, *John J. Corbett Press, Inc.*, 163 NLRB 154, enfd. 401 F.2d 673; **(c)** where the Union executed separate individual contracts with individual employer-members of the Association, *We Painters, Inc.* 176 NLRB 964; **(d)** where the employer had been suspended from the association for its failure to pay dues, *Senco Inc.*, 177 NLRB 882; **(e)** where the employer was subjected to a strike, *State Elec. Serv.*, 198 NLRB 593 enfd. 477 F.2d 749; and **(f)** where the employer suffered a sharp decline in its business, *Serv-All Co.*, 199 NLRB 1131 enfd. denied on other grounds, 491 F.2d 1273.

A multi-employer bargaining unit is an exception to the normal single employer unit. Once established, however, authorization by an employer to the group can be withdrawn at any time, with the exception that it can't be done after the commencement of negotiations for a new agreement unless there are "unusual circumstances."

The undisputed evidence is that Forest, during the term of a contract between the Association and Local 522, joined the Association and agreed to abide by the terms and conditions of that Agreement. There is no question but that it had thereby agreed to "group bargaining" and therefore that it and its employees became part of a multi-employer bargaining unit.

It also is undisputed that Forest did not give the Union notice of its intention to withdraw from group bargaining before the commencement of the negotiations. (February 8, 2005). Moreover, the credible evidence indicates to me that Forest did not even give notice to the Association of its intention to withdraw from the Association prior to the time that bargaining commenced.

Inasmuch as the evidence shows that Forest was a member of the Association, and therefore assented to group bargaining, and that it did not give timely notice of its intention to withdraw before negotiations commenced, it must be concluded that it is bound to the contract that was executed between the Union and the Association. Accordingly, I conclude that by failing and refusing to abide by the new 2005-2010 contract, Forest has violated Section 8(a)(1) and (5) of the Act. Also, as its employees of Forest were part of a much larger multi-employer bargaining unit, the assertions by five of Forest's employees that they no longer wished to be represented by Local 522, cannot be the basis for Forest's withdrawal of recognition. In this respect, I also conclude that Forest has violated Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. By refusing to abide by the collective bargaining agreement that was mutually agreed to between Teamsters Local 522 and the Building Material Suppliers Association, the Respondent has violated Section 8(a)(1) & (5) of the Act.

2. By withdrawing recognition from Teamsters Local 522, the Respondent has violated Section 8(a)(1) & (5) of the Act.

3. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as I have concluded that the Respondent has violated the Act by refusing to abide by the collective bargaining agreement reached with the Building Material Suppliers Association, it shall be ordered to abide by the terms and conditions of this agreement.

It is further recommended that to the extent that the Respondent has failed to comply with the terms of the above described contract that it be ordered to make whole their employees with interest, for any difference in wages and benefits that they have actually received and what they should have received under the terms of the new contract. Also to the extent that the Respondent has not made payments to any benefit funds in the amounts required by the new contract, it should make such funds whole in accordance with the terms of the aforesaid agreement. Moreover, it is recommended that any such fund payments be made with interest to be computed according to the practice set forth in *Merryweather Optical Co*., 240 NLRB 12l3, 12l6 fn. 7 (l979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure, if any, to make such required payments or contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to unit employees shall be computed in the manner set forth in *Ogle Protection*

Service, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1172 (1987).[5]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Forest Panel and Lumber Home Center, Inc. d/b/a Forest Builders Supply, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Local 522, International Brotherhood of Teamsters by refusing to abide by the contract that was agreed to between that Union and the Building Material Suppliers Association on March 7, 2005.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay into the Union's benefit funds on behalf of unit employees, the amount of contributions that were not made in the amount required by the aforesaid collective bargaining agreement in the manner set forth in the Remedy section of this decision.

(b) Make whole any employees for any losses suffered by reason of their unlawful failure to abide by the terms of the aforesaid agreement in the manner set forth in the Remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

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[5] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days after service by the Region, post at its facilities in the Queens, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 2005.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C., March 9, 2006.

Raymond P. Green
Administrative Law Judge

[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively with Local 522, International Brotherhood of Teamsters by withdrawing recognition from that Union or by refusing to abide by the contract that was agreed to between that Union and the Building Material Suppliers Association on March 7, 2005.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL pay into the Union's benefit funds on behalf of unit employees, the amount of contributions that were not made in the amount required by the aforesaid collective bargaining agreement.

WE WILL make whole any employees for any losses suffered by reason of our failure to abide by the terms of the aforesaid agreement, in the manner set forth in the Remedy section of this decision.

Forest Panel and Lumber Home Center, Inc.
d/b/a Forest Builders Supply
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One Metro Tech, Jay Street and Myrtle Avenue, Brooklyn, NY 11201-4201. Hours: 9 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 860-240-3528.